

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

Index No.

08-1789

THE SIPA LINK,

Debtors.

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February 4, 2009

United States Custom House

One Bowling Green

New York, New York 10004

Disinterestedness Hearing.

Trustee's motion pursuant to Sections 105(a) and  
365(a) of the Bankruptcy Code and Bankruptcy Rule 6006  
Seeking Authority to Reject Executory Contracts on a Nunc  
Pro Tunc Basis, et cetera.

B E F O R E:

HON. BURTON R. LIFLAND,

U.S. Bankruptcy Judge

A P P E A R A N C E S:

BAKER HOSTETLER

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New York, New York 10017

BY: IRVING H. PICARD, ESQ.

-and-

DAVID J. SHEEHAN, ESQ.

SECURITIES INVESTOR PROTECTION CORPORATION

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BY: HOWARD KLEINHENDLER, ESQ.

1 PROCEEDINGS

2 THE COURT: The SIPA Link.

3 MR. PICARD: Good morning, Your Honor.

4 THE COURT: Good morning, Mr. Picard.

5 MR. PICARD: Irving Picard, trustee for  
6 the liquidation of Bernard L. Madoff Investment Securities,  
7 LLC.

8 Your Honor, I would like to suggest that  
9 perhaps we do the disinterestedness matters first.

10 THE COURT: Sure.

11 MR. PICARD: Your Honor, then once we are  
12 are done with that, perhaps I can give a little status  
13 report.

14 THE COURT: Please, I think people are  
15 expecting that.

16 MR. PICARD: And then we could go into the  
17 other motions.

18 THE COURT: Go ahead.

19 MR. PICARD: Your Honor, my declaration of  
20 disinterestedness was filed approximately a month ago. As  
21 indicated in the application in our briefing book, it is  
22 item number 2, I have no conflicts within the statutory  
23 provisions of SIPA, nor if you ask me would I have any  
24 under the Bankruptcy Code, and there were no objections  
25 filed to the declaration, and I would ask that Your Honor

1 find that I am disinterested and able to continue in the  
2 capacity as Trustee of this case.

3 THE COURT: Does anyone else want to be  
4 heard?

5 Hearing no response, your application is  
6 granted.

7 MR. PICARD: Thank you, Your Honor. Mr.  
8 Sheehan will handle the other matters.

9 MR. SHEEHAN: Your Honor, as you have again  
10 in the briefing book, as item number 1, is the affidavit of  
11 disinterestedness filed by myself and the firm that I am  
12 partner in Baker Hostetler, evidencing that there are no  
13 conflicts within the purview of the statute.

14 Again, this has been filed for over a month  
15 and we have not received any objections.

16 I move Your Honor to enter the order  
17 finding us to be disinterested and that we could continue  
18 in our role as counsel to the Trustee.

19 THE COURT: I have reviewed the  
20 applications, and I concur there is no element of  
21 disinterestedness shown here to preclude the granting of  
22 the request.

23 MR. SHEEHAN: Thank you, Your Honor.

24 MR. PICARD: Your Honor, I have the order  
25 and a disk. I just noticed that it did not have a date on

1 it, and if your chambers would put the date on it, we would  
2 be obliged.

3 THE COURT: Yes, we could arrange for  
4 that.

5 MR. PICARD: Thank you. May I approach,  
6 Your Honor?

7 THE COURT: Yes. I will entertain the  
8 order.

9 I have approved the order.

10 MR. PICARD: Thank you, Your Honor.

11 During the approximately six or seven weeks  
12 since I have been appointed, Your Honor, we have spent a  
13 lot of time with the law enforcement authorities as well as  
14 some securities regulators, and a substantial amount of  
15 time has been spent in those areas.

16 Within a day of my appointment the premises  
17 at the Lipstick Building at 885 Third Avenue was seized by  
18 the FBI, the premises are deemed as a crime scene by the  
19 U.S. Attorney's Office. So we are working under certain  
20 constraints. We have worked out protocols so that we  
21 could get access to the records. But there are parts of  
22 the premises that we cannot go to, nor can anyone else  
23 other than if you are escorted by the FBI on a need to know  
24 or need to go basis.

25 Your Honor, that created certain problems

1 with getting computer information that has now been  
2 resolved. We had a group go into a warehouse in Queens, I  
3 guess it was about ten days ago to inventory approximately  
4 7,000 boxes of records, which were out there. Some news  
5 reports indicated there was some hush-hush project going on  
6 out there, but I assure you it was not hush-hush.

7 In the furtherance of the Trustee's duties,  
8 both for the statutory investigation, those records are  
9 important and, secondly, those records will be necessary in  
10 the claims process, reviewing claims and looking at account  
11 histories which will become a critical aspect of the  
12 customer complaint process.

13 In addition, probably what most people  
14 would like to hear about now is that during the course of  
15 this period we have been working with a number of banks and  
16 financial institutions to recover funds in Madoff  
17 Investment Securities accounts, and also the securities  
18 that were on deposit at the Depository Trust Company.

19 I am pleased to report that the earnings as  
20 of the close of business yesterday we had actually  
21 recovered about \$111,426,000. That if Your Honor approves  
22 several stipulations with the banks that are on the  
23 calendar this morning, we will have another almost \$535  
24 million in cash. Those funds will be invested. They  
25 will be set aside, and their distribution will be subject

1 to further court order. That court order may not come for  
2 quite a while. It is our intention to designate those  
3 funds as customer property and the distribution of those  
4 funds would be subject to under a SIPA statute of what is  
5 called an allocation application where money is allocated  
6 between the customer fund and the general estate.

7 As I said, Your Honor, and it is important  
8 to note that we will, it is our intention to have all these  
9 funds and funds from other assets that we are able to  
10 collect to go into the customer fund and be available to  
11 distribute to the customers who were victimized in this  
12 matter.

13 In addition, Your Honor, from the DTC last  
14 week we recovered securities that had an estimated market  
15 value at the time of approximately \$300 billion, between 15  
16 and 16 million positions of which approximately 20 to 25  
17 are probably illiquid securities, and over a period of time  
18 those securities are going to be liquidated and turned into  
19 cash.

20 It is my intention to take all the cash as  
21 we get it and invest it in short-term government or  
22 something that will give us a little bit of a return, so  
23 that we could build up the pot and have some additional  
24 funds that we could distribute to the customers.

25 These distributions to the customers, Your

1 Honor, are over and above the amount of money that will be  
2 available from the SIPC fund. So if someone had, for  
3 example, an \$800,000 claim and they got \$500,000 of SIPC  
4 money, when we allocate down the road they would get a pro  
5 rata share to cover the \$300,000 balance.

6 As I said, that is our intention and it  
7 will be subject to a Court application and people can be  
8 heard at that time if they disagree with us.

9 We have begun, and it has been a number of  
10 weeks after the Trustee's statutory investigation. We are  
11 looking for the assets, where they are and how we could get  
12 them. We are looking into various causes of action that  
13 we may have against third parties, and we hope that in the  
14 very near future we will be coming before Your Honor with a  
15 proposal to sell the market-making operation, which is at  
16 the moment the one asset that we have our hands on that we  
17 think has some value and that perhaps we could get a little  
18 auction going for its sale. Again, Your Honor, those  
19 proceeds, it would be our intention to put into the  
20 customer fund.

21 There are two other matters, not  
22 necessarily having to do with what our activities have been  
23 and what we have now and what may be going on, is that  
24 there seems to be a misunderstanding both on the part of  
25 customers and the press with regard to what the bar date is



1 in this case.

2 There is a statutory bar date in SIPA  
3 liquidations which goes six months from the date of the  
4 publication of notice. The publication of notice was on  
5 January 2, so the bar date in this case is July 2009.

6 The confusion I think arises from the fact  
7 that there is a provision in the statute which says that if  
8 you don't get your claim in by a certain date that the  
9 Trustee has some discretion on how to handle your claim,  
10 that is if it saves you some money maybe then you don't  
11 have to buy the securities, you could pay cash. At this  
12 time people should be focusing on the July 2, 2009 bar date  
13 as the one, rather than the preferred bar date.

14 The other item is, Your Honor, and we will  
15 be issuing a press release on this, hopefully, in the next  
16 day or so, we will not be issuing the IRS form 1099s. In  
17 my view and that of my consultants who have been working  
18 with me, the records are not accurate. They can't be  
19 verified, and we would be doing a disservice to everybody.

20 What we are telling our customers who are  
21 calling in, and we have a hotline that is being manned by  
22 Alix Partners, who are also working on the claims, is that  
23 in terms of how you deal with tax issues you have to  
24 contact your tax advisor.

25 We are not in a position to give any tax

1 advice to customers on what they should do about losses or  
2 whatever. The most important thing is within the next two  
3 weeks that people might be expecting to receive a 1099  
4 form, and we are just not going to be issuing them.

5 I think one of the last points I would like  
6 to make is that through e-mails and telephone calls there  
7 seems to be a concern to people regarding, and I referred  
8 earlier to the SIPC case, if you will, the two estates.

9 One is called customer property and one is  
10 called the general estate. All of the expenses, the rent  
11 of the premises, the telephone telephones, the consultants,  
12 the lawyers, me, all those expenses are paid by SIPC out of  
13 its coffers because the statute says that if the general  
14 estate is not sufficient to pay the administration costs  
15 then SIPC has to pay. And when SIPC pays those expenses,  
16 those expenses are not going to be attached to the customer  
17 property.

18 So if we sell something for \$1 million, the  
19 gross proceeds, \$1 million will go into the customer pot.  
20 That will then be available for the allocation and the  
21 distribution to customers. Unlike a typical bankruptcy  
22 case, where when the Trustee sells an asset, his expenses,  
23 his fees come out of the gross proceeds of the sale. So  
24 that he is only then going to distribute net proceeds.

25 I believe along the way in a case of this

1 size, that will be a very big distinction, and I would like  
2 people to really keep that in mind that when we say that we  
3 are paying money for rent, \$350,000 a month, approximately,  
4 all of those costs are not coming at the expense of the  
5 customer property.

6 Thank you, Your Honor.

7 THE COURT: Does anyone else want to be  
8 heard?

9 Hearing no response, you could proceed with  
10 your menu.

11 MR. SHEEHAN: There are before Your Honor  
12 two applications with regard to the executory contracts.  
13 The first one deals with an extension of a 60-day period.

14 As alluded to by Mr. Picard, we are  
15 operating under difficult circumstances, to say the least,  
16 in getting access to the records. In an abundance of  
17 caution we seek this additional time so we don't incur a  
18 forfeiture unnecessarily. There are no objections that I  
19 am aware of.

20 I would again ask Your Honor to approve  
21 that application and to grant us that additional time in  
22 which to consider the executory contracts before we take  
23 action.

24 THE COURT: Does anyone else want to be  
25 heard?

1                   Hearing no response, let me say that I have  
2 reviewed the request and I find that under the  
3 circumstances it is appropriate. I will entertain an  
4 order for its approval.

5                   MR. PICARD: Thank you, Your Honor.

6                   THE COURT: I have approved the order.

7                   MR. SHEEHAN: Thank you.

8                   The next application with regard to  
9 executory contracts is very specific. It is an  
10 application to reject six very specific and as identified  
11 in the papers car leases, automobile leases. Those cars  
12 were returned immediately by the Trustee upon his approval  
13 at the premises. They have been in the hands of lessors  
14 since the inception of the case.

15                   Accordingly, what we are seeking to do here  
16 today, Your Honor, is reject those leases nunc pro tunc,  
17 back to the filing date of December 11, 2008.

18                   There has been no objection, save one, and  
19 that is by an employee, Mr. Kugel. I think Your Honor is  
20 probably familiar with that. But, just for the record,  
21 Mr. Kugel was directed by Peter Madoff according to the  
22 papers to sign the guarantee.

23                   So as a result of this rejection, Mr. Kugel  
24 is on the hook it appears for the guarantee of the lease.  
25 There is nothing we could do about that. I don't think we

1 have any comment, quite frankly, on that objection. I  
2 don't think it should interfere with the Trustee's ability  
3 to exercise his statuary duty to reject this lease, which  
4 would serve no purpose for the trustee to continue paying,  
5 even though it puts Mr. Kugel in jeopardy, Your Honor,  
6 fully, and I have talked to Mr. Kugel personally about  
7 this. I see it as his problem and not ours.

8 THE COURT: Does anyone else want to speak?

9 MR. GOGEL: Yes, Your Honor, William Gogel.  
10 I am with the law firm of Agulnick & Gogel. I represent  
11 Craig Kugel.

12 I think it is quite clear on paper when  
13 Madoff directed Peter to execute this lease, it was  
14 executed on behalf of Madoff, LLC. He also signed it as a  
15 guarantor. It has never been his intention to sign as a  
16 guarantor, but the reason he signed it was Rally Motors and  
17 Mercedes Benz Financial rejected the application on behalf  
18 of Madoff, LLC without a guarantor.

19 THE COURT: I think that everybody  
20 understands that.

21 MR. GOGEL: But here --

22 THE COURT: But his signing of these  
23 documents is certainly an act of volition. It perhaps was  
24 naive.

25 I have been asked to sign on behalf of

1 relatives and I have refused, even though there was some  
2 kind of imperative, and I wouldn't dare ask my wife to sign  
3 anything because I know what she would tell me.

4 This is an act of volition, and I have not  
5 heard anything that he was mentally incapacitated and,  
6 therefore, subject to a domineering employer.

7 MR. GOGEL: No, Your Honor but --

8 THE COURT: There is no basis for the  
9 objection to the rejection.

10 MR. GOGEL: Judge, may I say one other  
11 thing. In the rejection signed by Peter Madoff where Craig  
12 Kugel signed the document, it directed him in the body of  
13 it to sign a document that was required to have this lease  
14 executed, and Mercedes would not give the lease unless  
15 there was a guarantor. Specifically, in the certification  
16 of the resolution.

17 THE COURT: Hello boss, they wouldn't ever  
18 give it to me without a signature.

19 MR. GOGEL: Exactly.

20 THE COURT: That is what he could have and  
21 should have done. The objection is overruled.

22 MR. SHEEHAN: Your Honor, I realize upon  
23 looking at the order it does not address Mr. Kugel's  
24 objection.

25 What I would like is Your Honor's

1 permission to submit an order that includes Your Honor's  
2 ruling with a new disk, and I will get it to you this  
3 afternoon.

4 THE COURT: Very well. Submit the order.

5 MR. GOGEL: Thank you.

6 MR. SHEEHAN: There are two other items  
7 before the presentment, one of which is unopposed, it is an  
8 agreement we have with the Bank of New York with regard to  
9 the turnover to the trustee of the precise amount which is  
10 in the vicinity of \$300 million. We have agreed, Your  
11 Honor, because there could be third-party claims, as there  
12 are against the Chase Manhattan account.

13 We have agreed to indemnify, "we" being not  
14 the Trustee but SIPC standing behind the Trustee, this will  
15 again not imperil any customer fund. But we stand behind  
16 that, and we will indemnify the bank should there be any  
17 third-party actions with regard to these specific funds.

18 So the bank does not have to worry about  
19 being in peril of turning them over. Having reached that  
20 agreement and having the indemnity in place, the bank has  
21 agreed to turn the funds over to us. As I understand,  
22 there is no objection to this stipulation and I would ask  
23 Your Honor approve it.

24 THE COURT: Does anyone want to be heard?

25 Hearing no response, the application is

1 granted.

2 MR. PICARD: May I approach the bench,  
3 Your Honor?

4 THE COURT: Yes. I have approved the  
5 order.

6 MR. SHEEHAN: Thank you, Your Honor.

7 The last item for the agenda today is, in  
8 fact, a stipulation and presentment that we have provided  
9 to your Honor with regard to a turnover, again, of bank  
10 funds, this time from J.P. Morgan Chase, it is the account,  
11 basically operating account of Madoff Securities. Again,  
12 it is in the amount of approximately \$200 million, the  
13 exact amount would be in the papers and would be in the  
14 order.

15 The only thing that stands in the way of  
16 that is an objection we received last night. I understand  
17 why, according to this, that counsel filed because we had  
18 also filed last night a motion to dismiss the Rosenman  
19 case.

20 Now, if I could put our position on the  
21 record since we did not have a chance to submit anything to  
22 you.

23 At the outset when Mr. Kleinhendler  
24 contacted me we had our position. Your Honor, we believe  
25 this complaint is ill-founded as, obviously, we said in our



1 papers to you.

2                   However, I understood Mr. Kleinhendler's  
3 concern. We agreed to a stipulation to the extent those  
4 funds were to weave in and be brought over to the trustee,  
5 we would keep \$10 million, even though it is all fungible.  
6 And that is our argument, it is all one big body of  
7 commingled funds.

8                   But in any event we would keep that, not  
9 spend the \$10 million, it would sit there until Your Honor  
10 had at chance to resolve the issue in the adversary  
11 proceeding. I don't see that having changed at all by  
12 virtue of what is happening here. We stipulate to that.  
13 The Trustee will honor that stipulation.

14                   The fact that the funds are being held at  
15 Chase Manhattan Bank under Madoff Securities and  
16 transferred over to the Trustee and would be held by him in  
17 another account, I don't see see that as jeopardizing what  
18 counsel was suggesting is in place.

19                   I represent to your Honor we will not spend  
20 the \$300 million any time too soon, and I think pretty soon  
21 we will have this issue resolved.

22                   So I would respectfully suggest that the  
23 objection be overruled.

24                   MR. KLEINHENDLER: Good morning, Your  
25 Honor. Howard Kleinhendler, for the Rosenman family.

1 The objection I filed is limited. What  
2 concerned me --

3 THE COURT: Limited with a capital L.

4 MR. KLEINHENDLER: Yes, with a capital L.

5 What concerned me was some of the language  
6 in this proposed order which could indicate that the Court  
7 has already made certain determinations with regard to this  
8 \$10 million deposit.

9 For example, Your Honor, in some of the  
10 whereas clauses, the funds are referred to as the Debtors'  
11 funds. They are going to be allocated as customer  
12 property.

13 All I want to do, Your Honor, is have a  
14 placeholder and a clarification that regardless of the  
15 language in the stipulation that is being proposed right  
16 now, that will not affect the merits of my claim which is,  
17 basically, the money in the Chase account, that money  
18 belongs to my client. It does not belong to the trustee.  
19 It is not customer funds. It doesn't fall under the SIPC  
20 statute, and as long as we know that argument has not been  
21 given up, I have no problem then with the money moving from  
22 Chase to an account controlled by the Trustee. That was  
23 the point of the objection.

24 MR. SHEEHAN: Certainly, Your Honor, I  
25 could agree that was not the purpose of the order. That

1 was not the purpose of the whereas clauses to somehow end  
2 the claim of Mr. Rosenman here.

3 THE COURT: Which is already subject to the  
4 stipulation --

5 MR. SHEEHAN: Exactly, Your Honor.

6 THE COURT: -- preserving at least \$10  
7 million of funds. I don't know why so much time and  
8 effort has been utilized to charge for these papers. Mr.  
9 Rosenman has suffered enough, apparently, and he has to pay  
10 a little bit more for something that seems to be quite  
11 self-evident.

12 The complaint is the subject of a motion to  
13 dismiss. The issue, which is the ultimate issue, will  
14 either be the subject of a trial or of the motion to  
15 dismiss. So you are not out of Court. The Court will  
16 have an opportunity to rule on your position as soon as you  
17 respond to the motion to dismiss.

18 Your limited objection is overruled. It  
19 is not really founded.

20 MR. SHEEHAN: Your Honor, I have another  
21 problem with the order, I didn't anticipate the objection  
22 because it was filed last night.

23 I will again give you a supplemental order,  
24 including a new order which includes the denial of the  
25 limited objection and the new disk this afternoon, the same

1 as in the other one.

2 THE COURT: If you have a paper order in  
3 front of you, all you have to do is insert.

4 MR. PICARD: Your Honor, the problem with  
5 this is that it is a stipulation.

6 MR. SHEEHAN: Right.

7 MR. PICARD: So we will have to give you a  
8 separate order.

9 THE COURT: Very well. Submit the order.

10 MR. SHEEHAN: Thank you, Your Honor. That  
11 concludes our agenda for today, Your Honor.

12 THE COURT: Well, before we conclude, I will  
13 say that I think things are moving a little bit slower than  
14 some people would have anticipated, at least on the public  
15 front. I don't know really what is going on behind the  
16 scenes.

17 After all, there are so many agents and  
18 agencies and units of government that are charged with  
19 maximizing the recovery for redistribution to those who  
20 have been importuned by this financial debacle, it's a  
21 problem, it's now a Madoff scheme as opposed to a Ponzi  
22 scheme.

23 I would hope all these groups are not  
24 working at cross purposes, and I have a feeling because of  
25 the media coverage, these things are like a hovering

1 parent -- that all the agencies are not pulling together,  
2 and I would hope that there is going to be shown to the  
3 Court and to all of the courts that are involved that you  
4 are all working in harmony to maximize the recovery, and  
5 not working at cross purposes so as not to jeopardize  
6 whatever assets are out there because indeed those assets  
7 in my experience are wasting assets.

8 What is not typical in any bankruptcy case  
9 is that the administration expenses are not being charged  
10 to those that are laboring to bring monies back into the  
11 estate. So I would like the word to get out that I would  
12 hope that all parties start working in harmony and not in  
13 disharmony because wasting assets are something that could  
14 never, never be recovered. Thank you.

15 MR. SHEEHAN: Thank you, Your Honor.

16 MR. PICARD: Your Honor, there may be some  
17 people with questions. If we stay, can we use the  
18 courtroom for a little while.

19 THE COURT: I am not charging rent. This  
20 is another freebie.

21 MR. PICARD: Thank you, Your Honor.

22

23 \* \* \*

24

25

C E R T I F I C A T E

STATE OF NEW YORK            }  
  }       ss.:  
COUNTY OF NEW YORK        }

I, MINDY CORCORAN, a Shorthand Reporter  
and Notary Public within and for the State of New York, do  
hereby certify:

That I reported the proceedings in the  
within entitled matter, and that the within transcript is a  
true record of such proceedings.

I further certify that I am not related, by  
blood or marriage, to any of the parties in this matter and  
that I am in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have hereunto set my  
hand this 4th day of February, 2009.

\_\_\_\_\_  
MINDY CORCORAN

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